UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
MAY 14, 1993
Clerk, U.S. District Court
Central District of California
Santa Ana Office
/s/

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

GEORGE PETERSON,
Plaintiff,
v.
AMERICAN LIFE & HEALTH
INSURANCE CO., et al.,
Defendants.

SA CV 91-160 AHS (RWRx)

ORDER GRANTING SUMMARY JUDGMENT

I.

INTRODUCTION

On April 22, 1993, the Court issued a minute order electing to treat the present case as one amenable to summary adjudication under the provisions of Rule 56 and under the authority of *Portsmouth Square v. Shareholders Protective Comm.*, 770 F.2d 866 (9th Cir. 1985) because although the case was prepared for trial, it appeared that no factual disputes existed and only legal issues remained to be resolved. On May 3, 1993, defendants submitted a Supplemental Memorandum in

Support of Summary Judgment. Plaintiff filed his Supplemental Memorandum at the Los Angeles Clerk's Office on May 10, 1993 despite the Court's direct order (due to the shortened briefing schedule) to file any supplemental papers in the Santa Ana Clerk's Office; as a result, the Court did not receive plaintiff's Supplemental Memorandum until May 11, 1993. The matter was set for hearing on the Court's May 14, 1993 calendar.

The Court, having received, read and considered the foregoing — as well as each party's proposed Findings of Fact and Conclusions of Law, the counter-marked versions thereof (in conformity with this Court's Standard Order for Court Trials), plaintiff's Trial Brief filed April 13, 1993, defendant's Trial Brief filed the same day, defendants' Motion in Limine to Exclude Evidence re Formation and Maintenance of Pacific Southwest Association of Small Employer Firms filed April 13, 1993, and the Pre-Trial Conference Order filed February 22, 1993 — finds the matter appropriate for submission on the papers without oral argument. *See* Local Rule 7.11 (the Court may dispense with oral argument on any matter unless otherwise required); Fed. R. Civ. P. 78. The matter is, therefore, removed from the Court's May 14, 1993 calendar.

II.

ANALYSIS

A court may grant summary judgment if "the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). If the party bearing the burden of proof cannot show that the record

raises a genuine issue of fact by providing admissible evidence to the court, summary judgment should be granted. The adverse party to a summary judgment motion may not rest upon mere allegations or denials in his pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Rather, the party must present *admissible evidence* showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). Mere conclusory statements, as they are not admissible evidence, will not survive summary judgment. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *S.A. Impressa de Viacao Area, Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235 (9th Cir. 1980).

In the present case the pertinent facts are undisputed. Despite plaintiff's persistent arguments (which have been previously considered and rejected), the Court has previously determined that the California statute and regulation cited by plaintiff are preempted by ERISA, stricken the causes of action pertaining to the Pacific Southwest Association of Small Employer Firms, concluded that the insurance policy, at issue in a group policy rather than an individual policy, and ruled that any discovery related to these issues was irrelevant to the case. *See, e.g.*, Minute Order dated April 22, 1993. The sole remaining issue of law is whether the term "bypass surgery" in the insurance policy issued by defendant excludes coverage for plaintiff's coronary bypass surgery.

Courts "interpret terms in ERISA insurance policies 'in an ordinary and popular sense as would a [person] of average intelligence and experience.' " *Evans Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (citing *Allstate Ins. Co. v. Ellison*, 757 F.2d 1042 (9th Cir. 1985)). Moreover, courts "will not artificially create ambiguity where none exists." *Id.* The Court finds, as a matter of law, that the normal and ordinary meaning of the term bypass

surgery includes coronary bypass surgery. The term is not ambiguous, and the Court therefore is not bound by the analysis regarding ambiguous terms undertaken by the Ninth Circuit in *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990). Accordingly, plaintiff's surgery unambiguously falls within the exclusion, and defendants are entitled to judgment as a matter of law.

III.

CONCLUSION

For the foregoing reasons, the Court grants summary judgment in favor of defendants. Further, the Court has this date modified, signed and filed defendants, Proposed "Findings of Fact and Conclusions of Law," deemed by the Court to be a Statement of Uncontroverted Facts and Conclusions of Law.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on all counsel of record.

Dated: May 14, 1993.

/s/ Alicemarie H. Stotler
Alicemarie H. Stotler
United States District Judge

ter
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